SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 957

ALFONSE DOBRUSKY,
Petitioner and Plaintiff in Error Below,

vs.

STATE OF NEBRASKA,
Respondent and Defendant in Error Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Supreme Court of the State of Nebraska is reported in — Nebr. —, filed August 1, 1941, 299 N. W. 593 (R. 80-89).

II.

Jurisdiction.

1. The date of the judgment to be reversed is August 1, 1941 (R. 44). The motion for re-hearing was overruled by the Supreme Court of the State of Nebraska on November 17, 1941 (R. 53).

2. The provisions of the Constitution of the United States which are believed to sustain the jurisdiction of this Court are:

U. S. C. A. Const., Part 2, p. 517; U. S. C. A. Const., Part 2, p. 566; and U. S. C. A. Const., Part 3, p. 334.

3. The specific claims of the petitioner in error raised in his motion for new trial (R. 4-9) on the specification that there was "misconduct of the jury" and upon his specification raised in his motion for rehearing (R. 52-53) that the bailiff of the court in the District Court of Otoe County, Nebraska, and who was the sworn officer in charge of the jury, remained with the jury for a period of about five and one-half hours while the jury was deliberating the case wherein the petitioner was accused of manslaughter which was prejudicial to the Constitutional rights of the petitioner and in this regard the Supreme Court of the State of Nebraska totally ignored petitioner's request for the review of this error and did not mention or discuss said error in its opinion filed on August 1, 1941 (R. 45-51) and petition contends that his Constitutional rights have been invaded by a failure of the Supreme Court of the State of Nebraska to review said question and reverse said case for a new trial because of said error.

4. The cases believed to sustain said jurisdiction are as follows:

Gandy v. *State,* 24 Neb. 716;
Cooney v. *State,* 61 Neb. 342; 85 N. W. 281;
Bramlett v. *State,* 129 Neb. 180, 261 N. W. 166;
State v. *Simon,* 101 N. J. L. 11, 127 Atl. 570;
People v. *Knapp,* 42 Mich. 267, 3 N. W. 927;
Pickard v. *State,* 74 Ind. 275;
McClary v. *State,* 75 Ind. 261;
Cole v. *Swan,* 4 G. Green, Ia., 32;

State v. *Cartwright,* 20 W. Va. 34;
State v. *Robinson,* 20 W. Va. 743;
State v. *Snyder,* 20 Kas. 306;
Hare v. *State,* 4 How. (Miss.), 187;
Slaughter v. *State,* 24 Texas 410;
Hoberg v. *State,* 3 Minn. 181;
Mattox v. *United States,* 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50;
State v. *Scholl,* 118 Kans. 629, 236 Pac. 816.

III.

Statement of Case.

This has already been stated in the preceding paragraph under I (pp. 1-4) of the petition for a writ of certiorari, which is hereby attached and made a part of this brief, which statement, in the interest of brevity, is not repeated at this point.

IV.

Specifications of Error.

1. The Supreme Court of the State of Nebraska erred in finding and holding that the judgment of the District Court of Otoe County, Nebraska, should be affirmed.

2. The Supreme Court of the State of Nebraska erred in refusing to determine that there was error in the trial of the petitioner in the District Court of Otoe County, Nebraska, when the bailiff of the court and the sworn officer in charge of the jury remained with the jury and in its presence for a period of five and one-half hours while the said jury was deliberating on the verdict in said case.

3. The Supreme Court of the State of Nebraska erred in overruling and denying the petitioner's motion for re-hearing where the question involved herein was specifically

brought to the attention of said Supreme Court of the State of Nebraska.

4. The Supreme Court erred in depriving the petitioner of his liberty without due process of law and in violation of the provisions of the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

Point A. The decision below is contrary to and in conflict with the provisions of the Constitution of the United States.

Point B. The decision below is contrary to and in conflict with prior State court decisions.

Point A.

Conflict With the Provisions of the Constitution of the United States.

The uncontroverted testimony and evidence in this case is to the effect that the bailiff of the court and sworn officer in charge of the jury was with and in the presence of the jury for a period of about five and one-half hours during which time the jury were deliberating upon the verdict which was finally returned to the District Court of Otoe County, Nebraska.

The Supreme Court, by its refusal to pass upon this question, has approved this procedure.

The opinion and judgment of the Supreme Court of the State of Nebraska is contrary to the Constitutional provisions guaranteed to every person, including the petitioner, that he be not deprived of his liberty, without due process of law as guaranteed by the Fifth Amendment to the Con-

stitution of the United States of America, which provides in part as follows:

> "* * * nor be deprived of life, liberty or property without due process of law." U. S. C. A. Const., Part 2, p. 517.

The opinion and judgment of the Supreme Court of the State of Nebraska is contrary to the Constitutional provisions guaranteed to every person, including the petitioner, that he be not deprived of his liberty, without due process of law as guaranteed by the Sixth Amendment to the Constitution of the United States of America, which provides in part as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. * * *" U. S. C. A. Const., Part 2, p. 566.

The opinion and judgment of the Supreme Court of the State of Nebraska is contrary to the Constitutional provisions guaranteed to every person, including the petitioner, that he be not deprived of his liberty, without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, which provides in part as follows:

> "* * * Nor shall any court deprive any person of life, liberty or property without due process of law." U. S. C. A. Const., Part 3, p. 334.

POINT B.

Conflict with State Court Decisions.

The case of *Gandy* v. *State*, 24 Neb. 716, 40 N. W. 302, opinion by Maxwell, J., laid down the rule and there has been no case to the contrary in said jurisdiction, that where

the bailiff remains in the room with the jury while the jury are considering their verdict, it is sufficient to vitiate the verdict.

The Nebraska court in the *Gandy* case followed *People* v. *Knapp*, 42 Mich. 267, 3 N. W. 927, holding that the officer in charge of a jury can not be present during the deliberation of the jury, although he may do nothing but listen.

The opinion in the *Knapp* case contains the following:

> "The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they (the jury) are sent out; and if one may be present, why not several?" * * *
>
> "The only proper and just course is to insist on a rigorous observance of the proper practice in order to prevent all occasions for injurious suspicions." (Part in parenthesis ours.)

The court's attention is directed to the adherence of the Nebraska Court to the rule of *Gandy* v. *State*, 24 Neb. 716, 40 N. W. 302, in the later decision of *Cooney* v. *State*, 61 Neb. 342, 85 N. W. 281. In the *Cooney* case after trial and the case was given to the jury and while they were deliberating upon their verdict, the sheriff and bailiff having them in charge went with them to their room and remained with them for several hours. The trial court found that the sheriff and bailiff were in the back part of the room, which was quite large, and that the jury while deliberating and discussing evidence, were north of the center of the room; that neither of the court officers took any part in the deliberations, or advised the jury regarding their verdict. The trial court further found that the presence of the sheriff and bailiff did not influence the jury in reaching their verdict and refused to grant a new trial on the ground of misconduct. The Nebraska court in the *Cooney* case cites and

approves *People* v. *Knapp*, 42 Mich. 267, 3 N. W. 927 and which case was cited and approved in the *Gandy* case. Also with reference to the presence of an officer in the jury room, it is said in the *Cooney* case:

> "His presence was calculated to restrict discussion and freedom of action in the jury room, and the presumption that it was prejudicial to the defendant is not overthrown by the conclusion deduced by the trial court from the facts above stated."
>
> "It is claimed that the doctrine of Gandy *v.* State, supra, should not be applied to misdemeanor cases, but no reason for making a distinction between the two classes of cases has been suggested, and none is perceived. The judgment is reversed, and the cause remanded for the further proceedings. Reversed and remanded."

The case was reversed.

To the same effect is *State* v. *Snyder*, 20 Kas. 306.

In *State* v. *Simon*, 101 N. J. L. 11, 127 Atl. 570, it was held that the defendant was entitled to a new trial where the jury was turned loose in court room during the night, where general conversation and stories were indulged in, even though the officers were on the other side of the room. This conduct was held prejudicial to the defendant and he was granted a new trial.

> "The jury room is a place of seclusion and privacy for members of the jury while they are deliberating on their verdict." *State* v. *Scholl*, 118 Kan. 629, 236 Pac. 816, 818.

Justice Paine of the Nebraska Supreme Court said in the case of *Bramlett* v. *State*, 129 Neb. 180, 261 N. W. 166:

> "We are unwilling to lend encouragement to the lax conduct of a bailiff which, if tolerated, would undermine the purity and efficiency of our jury system."

For the misconduct of the bailiff in the *Bramlett* case, the judgment of the trial court was reversed and a new trial ordered.

The cases of other state courts hereinbefore cited are in accord with the discussion above set forth and hold that it is improper for any outsider to remain in a room with a jury during the time the jury are considering their verdict and that prejudice is presumed and that such is sufficient to vitiate the verdict.

This Honorable Court's attention is directed to the case of *Mattox* v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50, wherein Chief Justice Fuller incorporated in his opinion the following:

> "Indeed, it was held in People *v.* Knapp, 42 Mich. 267, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases without regard to whether any improper influences were actually exerted over the jury or not."

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and that this Court should review the decision of the Supreme Court of the State of Nebraska and finally reverse it.

BERNARD M. SPENCER,
Counsel for Petitioner.